



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 17, 2023

IN THE MATTER OF:

Appeal Board No. 628591

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determinations, ruling the claimant was not entitled to receive benefits, effective November 21, 2022, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant's basic base period employment with the employers was excluded under Labor Law § 511 (9); and ruling the claimant was not entitled to receive benefits, effective November 21, 2022, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant's alternate base period employment with the employers was excluded under Labor Law § 511 (9). The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There was an appearance by the claimant. By decision filed March 14, 2023 (), the Administrative Law Judge sustained the initial determinations.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for a pool service and a country club while he was in high school.

He last attended high school classes on April 28, 2022, and graduated from high school on May 20, 2022. The claimant was paid total earnings of \$5,286.88 by the pool service, in paychecks dated May 26, June 2, June 9, June 16, June 23, and June 30, 2022 and of \$9,195.92 between July 1, 2022 and September 30, 2022.

The claimant filed a claim for unemployment insurance benefits on November 21, 2022. His filing established a base period of July 1, 2021, through June 30, 2022, and an alternate base period of October 1, 2021, through September 30, 2022.

OPINION: The credible evidence establishes that the claimant was in regular attendance as a student in high school through his graduation on May 20, 2022.

Pursuant to NY Labor Law § 511 (9), "employment" does not include service

during all or any part of the school year or regular vacation periods as a part-time worker of any person in regular attendance during the daytime as a student in an elementary or secondary school.

Consequently, the claimant's base period earnings, from both the pool company and the country club, through May 20, 2022, cannot be utilized to establish a valid original claim for benefits. Although the Commissioner of Labor has also precluded the claimant from using any of his earnings from the pool service after May 20, 2022, his graduation, we reject the analysis as unpersuasive. In so doing, we note that the claimant was not in "regular attendance during the daytime as a student in a...secondary school" effective May 20, 2022, because he had graduated from high school, also known as secondary school. As a result, NY Labor Law § 511 (9) no longer applies and the claimant's earnings

after May 20, 2022, should be considered when calculating his claim for unemployment insurance benefits in his alternate base period of October 1, 2021, through September 30, 2022.

We note that the claimant has demonstrated gross earnings in the second quarter of 2022 of \$5,286.98, derived from the checks dated May 26th through June 30, 2022. He then had \$9,195.92 in 3rd quarter earnings. Hence, the claimant's total earnings in his alternate base period are \$14,482.80

[\$5,286.98 (2nd 2022) +\$9,195.92 (3d 2022)], which is more than 1.5 times his high calendar quarter of \$9,195.92 ($1.5 \times \$9,195.92 = \$13,793.88$). These earnings, we note, also fell within two quarters of his alternate base period, the second and third quarter of 2022, and these earnings exceed \$2,900.00 in both the second and the third quarter of 2022. Accordingly, we conclude that the claimant has demonstrated sufficient earnings and wages within his alternate base period of October 1, 2021, through September 30, 2022, to establish a valid original claim for unemployment insurance benefits.

DECISION: The decision of the Administrative Law Judge is modified as follows, and as so modified, is sustained.

The initial determination, ruling the claimant was not entitled to receive benefits, effective November 21, 2022, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the

claimant's base period employment with the employers was excluded under Labor Law § 511 (9), is sustained.

The initial determination, ruling the claimant was not entitled to receive benefits, effective November 21, 2022, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the

claimant's alternate base period employment with the employers was excluded under Labor Law § 511 (9), is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER